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IN THE

Supreme Court of the United States

1644

EDWARD H. MILNE,

Petitioner

—against—

THE STATE OF VERMONT

OCTOBER TERM, 1970
No.

A PETITION FOR WRIT OF CERTIORARI TO THE VERMONT SUPREME COURT

EDWARD H. MILNE
17 AVERILL STREET
BARRE, VERMONT 05641
Pro se

INDEX

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
ARGUMENT	3
CONCLUSION	13

STATUTES

Constitution of the United States Fifth Amendment	3
Constitution of the United States Fourteenth Amendment	4
28 Vermont Statutes Annotated, section 1301 Uniform Act for Out-Of-State Parolee Supervision	11

DOCUMENTS

The Federalist, No. 78 July 17-20, 1788	5

TABLE OF CASES

Adamson v California
332 U. S. 46 (1947) ---------- 6

Adkins v Children's Hospital
261 U. S. 525 (1923) ---------- 7

Benton v Maryland
395 U. S. 784 (1969) ---------- 4, 6

Brinkerhoff-Paris Co. v Hill
281 U. S. 673 (1929) ---------- 7

Caldwell v Texas
137 U. S. 692 (1890) ---------- 8

Duncan v Louisiana
391 U. S. 145 (1968) ---------- 4, 6

Duncan v Missouri
152 U. S. 377 (1894) ---------- 8

Giozza v Tiernan
148 U. S. 657 (1893) ---------- 8

Goodwin v Page
296 F. Supp. 1205 (D. C. Okl,. 1969) ----- 7

In re Lorette
126 Vt. 286 (1967) ---------- 9, 10, 11

Leeper v Texas
139 U. S. 462 (1891) ---------- 8

Malloy v Hogan
378 U. S. 1 (1963) ---------- 4

Missouri v Taylor
266 U. S. 200 (1924) ---------- 13

Mooney v Holohan
294 U. S. 103 (1934) ---------- 7

Palko v Connecticut
302 U. S. 319 (1937) ---------- 6

People v Marsh
165 N. W. 2d 853 (C. A. Mich., 1968) ----- 7

Scaggs v Larsen
396 U. S. 1206 (1969) ---------- 3

Twining v New Jersey
211 U. S. 78 (1908) ---------- 6

U. S. ex rel Carbo v LaVallee
270 F. 2d 513 (C. A. N. Y., 1959) -------- 9

Washington v Texas
388 U. S. 14 (1967) ---------- 4

APPENDIX

Page

Opinion of the Vermont Supreme Court ------- 1

Order of the Washington County Court
of the State of Vermont ---------- 4

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD H. MILNE,

Petitioner

—against—

THE STATE OF VERMONT

A PETITION FOR WRIT OF CERTIORARI TO THE VERMONT SUPREME COURT

TO THE HONORABLE, the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

The petitioner respectfully requests that a writ of review issue to examine the order set forth on December 1, 1970, in the above-entitled cause, No. 55-70 October Term, 1970, Vermont Supreme Court, and does respectfully move for leave to so proceed.

OPINIONS BELOW

There was an opinion and order of the Vermont Supreme Court on December 1, 1970, affirming the order of March

25, 1970, of the Washington County Court of the State of Vermont. The opinion of the Vermont Supreme Court and the order of the Washington County Court are the appendix at the end of the within petition. The order of the Vermont Supreme Court is page 13 of the certified copy of the record. The Washington County Court is possessed of the record and a certified copy is submitted with this petition.

JURISDICTION

The jurisdiction of this Court is invoked under Rule 19(a), Rules of the Supreme Court of the United States; and Associate Justice Harlan, under Rule 22(4), granted an extension of time to and including April 29, 1971, in which to file this petition.

STATEMENT OF THE CASE

The petitioner was sentenced by the State of Maryland to a term of ten (10) years imprisonment, the term to start on October 18, 1961, and end on October 18, 1971 (Record, page 2).

Upon imprisonment the petitioner received a reduction in sentence for good behavior to February 28, 1970 (Record, page 3).

Ten days of the good behavior time was taken from the petitioner during imprisonment. This made the ending date of the sentence March 10, 1970 (Record, page 3).

During imprisonment the petitioner received a reduction in sentence of five (5) days for each month he worked. The petitioner worked forty and one-half (40 1/2) months, earning two hundred and two (202) days. This made the ending date of the sentence August 11, 1969 (Record, page 3).

In June, 1965, under the reciprocal compact, the petitioner was paroled from Maryland to the State of Vermont (Record, page 3).

On March 10, 1970, the petitioner, still being held on parole by the State of Vermont, respectfully petitioned the Washington County Court that he was being illegally held, against his will, contrary to the due process clause of the Fifth (5th) Amendment to the Constitution of the United States and that the writ of habeas corpus should issue to order the State of Vermont to release him forthwith (Record, page 3).

On March 25, 1970, the Washington County Court denied the petition (Record, page 11).

In the Vermont Supreme Court the petitioner formalized that, habeas corpus being applicable to a parole situation as set forth in *Scaggs v Larsen,* 1969, 396 U. S. 1206, at 1208, the petitioner should have been granted the writ and released from parole confinement since he was being denied due process of law contrary to the Fifth Amendment to the Constitution of the United States.

The Vermont Supreme Court affirmed the order of the court of first instance (Record, page 13).

POINT I

THE VERMONT SUPREME COURT SHOULD NOT HAVE AFFIRMED THE ORDER OF THE COURT OF FIRST INSTANCE SINCE TO DO SO WAS TO DENY THE PETITIONER DUE PROCESS OF LAW BECAUSE HE WAS BEING ILLEGALLY HELD IN PAROLE CONFINEMENT CONTRARY TO THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Fifth Amendment to the Constitution of the United States:

> . . . nor (shall any person) be deprived of life, liberty, or property, without due process of law; . . .

In the Vermont Supreme Court the petitioner continued bringing forward that the due process clause of the Fifth Amendment is a provision in the first ten amendments to the Constitution of the United States, a provision in the Bill of Rights; briefing, as set forth in *Malloy v Hogan*, 1963, 378 U. S. [illegible], at 4-6, 10-11, and *Benton v Maryland*, 1969, 395 U. S. 784, at 794-5, provisions in the Bill of Rights are applicable to the States, with the same standards, and not in watered-down version, through the due process clause of the Fourteenth Amendment to the Constitution of the United States; and, as a result, the Fifth Amendment due process clause is applicable to the States through the due process clause of the Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Which brings the due process clauses together, unites them, unifies them, makes them one.

For, though the United States Supreme Court has increasingly narrowed the guidelines it uses in applying the provisions in the various amendments in the Bill of Rights to the States, as in *Benton v Maryland, supra,* at 794-795:

> Recently, however, this Court has 'increasingly looked to the specific guarantees of the (Bill of Rights) to determine whether a state criminal trial was conducted with due process of law'. *Washington v Texas,* 388 U. S. 14 at 18 (1967). In an increasing number of cases, the Court 'has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights . . .' *Malloy v Hogan,* 378 U. S. 1 at 10, 11 (1964). Only last term we found that the right to trial by jury in criminal cases was 'fundamental to the American scheme of justice,' *Duncan v*

> *Louisiana,* 391 U. S. 145, at 149, (1968) and held that the Sixth Amendment right to a jury trial was applicable to the States through the Fourteenth Amendment. For the same reasons, we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our Constitutional heritage, and that it should apply to the States through the Fourteenth Amendment.

the petitioner submits that there should be no guidelines, that there should be no guidelines at all.

There should be no guidelines because the entire Constitution is the fundamental law of the land, fundamental to the American scheme of justice, the fundamental ideal in our constitutional heritage. All of the Bill of Rights are the fundamental law of the land, all are fundamental to the American scheme of justice, all are fundamental ideals in our constitutional heritage, and, therefore, all are applicable to the States through the Fourteenth Amendment:

> "The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded, as a fundamental law. It must, therefore, belong to them (courts), to ascertain its meaning, as well as the meaning of any particular Act proceeding from the Legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred. . . . Nor does the conclusion, by any means, imply a superiority of the Judicial to the Legislative power. It only supposes that the power of the people is superior to both, and that where the will of the Legislature declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the Judges ought to be governed by the latter, rather than the former." *The Federalist,* No. 78, July 17-20, 1788.

And the Court also said in *Benton v Maryland, supra,* at 795:

> Our recent cases have thoroughly rejected the *Palko* notion (*Palko v Connecticut,* 1937, 302 U. S. 319) that basic constitutional rights can be denied by the States as long as the totality of circumstances does not disclose a denial of 'fundamental fairness'. Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' *Duncan v Louisiana, supra,* at 149, the same constitutional standards apply against both the State and Federal Governments. . . . We today only recognize the inevitable.

And even the dissent in *Benton v Maryland, supra,* by Mr. Justice Harlan, Mr. Justice Stewart joining, says at page 808:

> Today *Palko* becomes another casualty in the so far unchecked march toward 'incorporating' much, if not all, of the Federal Bill of Rights into the Due Process Clause.

And the concurring opinion in *Duncan v Louisiana, supra,* Mr. Justice Black concurring, Mr. Justice Douglas joining, says at 163:

> I also agree because of reasons given in my dissent in *Adamson v California,* 332 U. S. 46, 68. In that dissent, at 90, I took the position contrary to the holding in *Twining v New Jersey,* 211 U. S. 78, that the Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the States.

And on page 166 of the same concurring opinion (*Duncan*), Mr. Justice Black further says:

> . . . I can say only that the words 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea

that henceforth the Bill of Rights shall apply to the States.

Also in accord are the cases of *People v Marsh,* C. A. Mich., 1968, 165 N. W. 2d 853; and *Goodwin v Page,* D. C. Okl., 1969, 296 F. Supp. 1205; which say:

> "Amendment 5 applies to the States via this Amendment (14th) and federal standards govern its application."

In further support that there should be no guidelines the petitioner submits that the Constitution of the United States is supreme and the courts, including the United States Supreme Court, cannot be arbitrary in its application:

> The Constitution, by its own terms, is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. A Congressional statute, on the other hand, is the act of an agency of this sovereign authority, and if it conflict with the Constitution, must fall; for that which is not supreme must yield to that which is. Sutherland, J., in *Adkins v Children's Hospital,* 1923, 261 U. S. 525 at 544.
>
> "If the result above stated (denial of due process of law) were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. . . . The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute. The federal guarantee of due process extends to state action through its judiciary as well as through its legislative, executive or administrative branch of government." *Brinkerhoff-Paris Co. v Hill,* 1929, 281 U. S. 673 at 679-680. Also in accord: *Mooney v Holohan,* 1934, 294 U. S. 103 at 113.
>
> "Due process of law, within the meaning of the Con-

stitution, is assured when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government." *Caldwell v Texas,* 1890, 137 U. S. 692, at 697. Also in accord: *Duncan v Missouri,* 1894, 152 U. S. 377 at 382; *Giozza v Tiernan,* 1893, 148 U. S. 657 at 662; *Leeper v Texas,* 1891, 139 U. S. 462 at 468.

Further support submitted in form of syllogism:

1. The Constitution is the supreme law of the land.
2. The Bill of Rights is a part of the Constitution.
3. Therefore, the Bill of Rights is the Supreme law of the land.

1. A fundamental aspect of due process is the elimination of arbitrariness in government.
2. The judiciary is a power of government that falls within the sphere of due process.
3. Therefore, the elimination of arbitrariness in the judiciary is a fundamental aspect of due process.

Conclusion: The elimination of the judiciary's arbitrary application of the Bill of Rights as the supreme law of the land is a fundamental aspect of due process.

The Vermont Supreme Court affirmed the order of the court of first instance, holding that the petitioner was not being illegally confined in a parole situation contrary to the due process clause of the Fifth Amendment to the Constitution of the United States (Opinion, page 1 of the appendix at the end of the within petition).

The Vermont Supreme Court said, on page 2 of the opinion:

> "It is clear from the record before us that the petitioner accepted the parole agreement. The explicit provisions of this instrument under paragraph 2 provide

> that the term of parole is 'until the expiration of such full, undiminished term' of ten years from October18, 1961."

Which means that the petitioner is not allowed a reduction in sentence for the work time he worked for, and earned while in prison; or the good behavior time he was credited with, and later earned by his good behavior. In other words, he is not given credit for his good behavior or his work.

So the petitioner says that even though he signed the parole agreement subject to the forfeiture of the good time and work time, he should be credited with them, and his sentence reduced while on parole.

For there is no room in the law for coercion; and one of the greatest coercions of all lies in imprisonment. The greatest coercion of all in imprisonment being the coercion to get out, to be released, to be free. And when one has a chance to get out, to be released, to be more free on parole, he signs the parole agreement, and is coerced to forfeit that which he is credited with and has earned, his good behavior time and his work time.

It is as said in *U. S. ex rel Carbo v LaVallee,* C. A. N. Y., 1959, 270 F. 2d 513, at 520:

> The due process clause of the Constitution does not safeguard one from physical abuse alone, as coercion may take many forms.

It is one thing to make one agree to conditions of behavior in signing a parole agreement, and another to coerce him by telling him that he will not be released on parole if he does not sign away that which he has earned.

The Vermont Supreme Court next said, on page 2 of the opinion, citing the case of *In re Lorette,* 126 Vt. 286, at 288:

> A conditional pardon is a grant, which becomes valid only on acceptance of it by the convict, who can reject it, but who on accepting it takes it subject to all conditions in the grant.

In the case of *In re Lorette, supra,* the petitioner was sentenced to prison for not less than three nor more than seven years. During his time of imprisonment he was given two conditional pardons and recommitted to prison for violation of each. After more than seven years, the time of his maximum sentence, had expired from the time he was originally sentenced, he, still being in prison, petitioned for a writ of habeas corpus.

The question presented, at page 287 in the case, was whether the time during which the petitioner had been in custody of the Governor under a conditional pardon should be computed as time during which he was serving his sentence.

The Vermont Supreme Court, at pages 288-289, said:

> The liberty enjoyed by a convict during the period he is at liberty under a conditional pardon is not a serving of the sentence of imprisonment at hard labor imposed by the sentencing court. A sentence "is the judgment of the court formally pronounced 'awarding the punishment to be inflicted.' " It deals out punishment and one of its underlying aims is to cause the subject to suffer for the wrong he had done. . . . While at liberty under terms of the conditional pardon, the petitioner was not receiving the punishment awarded him under the sentence of the court, and upon his commitment to prison for violation of the terms of his conditional pardon, he was liable to confinement for whatever part of his original sentence remained unserved.

Such theory of punishment and confinement should not be, because in a prison situation there are different forms of confinement: regular confinement, solitary confinement, in-

the-hole confinement; honor confinement, work release confinement, and parole confinement. All are earned by the convict, one way or another, and parole confinement, as in a conditional pardon, is merely a different form of the same confinement. It is the same confinement imposed by the sentencing court, the only difference being the degree of the confinement, the degree being earned, again one way or another, by the convict. And when one has earned the lesser degree of confinement, when one has earned parole confinement, or a conditional pardon, one should not be inflicted with the possibility of an extension of one's sentence. Should the terms of the lesser confinement be violated, one should be sent to a greater degree of confinement under the same, still running sentence.

To do otherwise, to do it the way of *In re Lorette*, is to impose double punishment; and the Supreme Court of the United States is called upon to review, to review and discard, the theory of *In re Lorette*.

The Vermont Supreme Court, on page 2 and 3 of the opinion, further says:

> "Moreover, the courts of this State do not have jurisdiction over the parole status of the petitioner and thus lack any authority to grant the writ of habeas corpus. The petitioner is under the supervision of the Probation and Parole Division of the Department of Corrections solely by reason of a compact agreement between this State and Maryland. Such compacts by Vermont with another state are authorized by 28 V. S. A. sec. 1301 known as the 'Uniform Act for Out-Of-State Parolee Supervision'. Under the compact statute a probationer or parolee is permitted to leave the state where he was convicted (sending state) and reside in another state (receiving state), there to be supervised according to the same standards that prevail for its own probationers and parolees. To this extent only is

> the petitioner under the control of the probation division of this State. And it is only when he is discharged under the laws of Maryland and/or removed from supervision under the compact agreement, that his supervision here is terminated."

The petitioner says that the courts of the State of Vermont do have jurisdiction. He is in the State of Vermont. Because of this the courts of the State of Vermont have jurisdiction over any wrongful act, civil or criminal, he commits in the state. And, in addition, while he is in the state, they have jurisdiction over him for any wrongful act, civil or criminal, he commits while he is outside the state.

And in the parole situation the courts of the State of Vermont have jurisdiction. Should his parole status be violated, by Vermont or Maryland, and he held in Vermont, to be returned to prison in Maryland, he could petition the courts of the State of Vermont for relief, the courts of the State of Vermont having jurisdiction to hear his petition, and grant or deny the relief, as they deem it.

And, keeping this in mind, the Court should note that the petitioner is asking for release under the law. He is asking for release under the laws of the United States, asking for release under the due process clause of the Fifth Amendment to the Constitution of the United States.

He asked the courts of the State of Vermont to rule that he was being held in parole confinement without due process and contrary to the laws of the Constitution of the United States. Had the courts of the State of Vermont conferred a favorable opinion and order of release on the petitioner, he would have requested the State of Maryland to honor the opinion and order under the Federal Constitution's full faith and credit clause, or its privileges and im-

munities clause. Or, better still, he would have gone to the way of certiorari and petitioned the opinion and order to the Supreme Court of the United States, petitioning for a broadening of the purview of the opinion and order, the final broadening to comprise the other 49 states, the final purview to include the State of Maryland.

Missouri v Taylor, 1924, 266 U. S. 200, at 208, says:

> When Congress creates a right of action and makes no provisions concerning the remedy, the federal and state courts have concurrent jurisdiction, and the plaintiff choosing a state court is entitled to whatever remedial advantage inheres in the forum.

CONCLUSION

For the reasons to here, since the petitioner is being held in parole confinement contrary to the due process clause of the Fifth Amendment to the Constitution of the United States, the Court is requested to grant the writ of review.

The questions are substantial; for ruling the petitioner's way will eliminate sentence inequities and quieten the hearts of all in a prison sentence situation.

And will promote uniformity of judgments, for by bringing together, by uniting and unifying the due process clauses, the country will be made one under the law.

And time will act, time will lend its hand. Time will lend its hand and elevate the state courts of last resort to the level of the federal courts of appeals; and the individual below will be able to bring a cause, under uniformity of judgments, using state or federal law, through state or federal court, in an improved federal republic, to the Supreme Court of the United States, as it should be.

Respectfully submitted,

EDWARD H. MILNE
Petitioner

APPENDIX

Opinion of the Vermont Supreme Court
Dated December 1, 1970

No. 55-70

In re Edward H. Milne

Supreme Court
Washington County
October Term, 1970

Present: Holden, C. J., Shangraw, Barney, Smith and Keyser, JJ.

KEYSER, J. By a petition for a writ of habeas corpus brought to Superior Judge Rudolph J. Daley the petitioner seeks an order for his discharge from parole granted him in June 1965 by the Department of Parole and Probation of the State of Maryland. After hearing, Judge Daley made findings on consideration of which the petition was dismissed and the petitioner appealed to this Court.

On November 30, 1961 the petitioner was sentenced by the General Court of Baltimore, Maryland to serve a term of ten years imprisonment from October 18, 1961. The petitioner claims because of an allowance of good behavior time and work time allowance while imprisoned that he was entitled to be discharged as of August 11, 1969 by the Vermont judiciary. He asserts that the refusal to do so deprives him of due process under the Fifth Amendment of the Federal Constitution.

In the hearing below the state introduced as an exhibit a photocopy of the Order for Release on Parole issued by the

Department of Parole and Probation of the State of Maryland. This order was signed by members of the Board of Parole and Probation and the witnessed signature of the petitioner who agreed as follows:

> "I hereby accept this parole and agree to comply with all of its terms and conditions; and in consideration of the granting to me of this parole, I hereby waive extradition to the State of Maryland and expressly agree that I will not contest any effort to return me to the State of Maryland in consequence of my violating any of the terms and conditions of this parole."

Paragraph 2 of the order states:

> "That this parole shall permit the parolee named herein to leave the institution of confinement, to serve the remainder of the full, undiminished term outside of the confines thereof, and comply with all the terms and conditions of this parole; that until the expiration of such full, undiminished term, the parolee shall be deemed to remain in legal custody."

In addition, we have before us a law memorandum filed by the petitioner on the date the case was argued to which was attached a photocopy of a letter to the petitioner from the Vermont Division of Probation and Parole, dated October 2, 1970, the body of which reads:

> "Regarding your request of this date, a review of your record indicates that the Department of Corrections, State of Vermont, received a letter from:
>
> Mr. Ralph S. Falconer
> Deputy Administrator
> Interstate PAROLE Compact
> State of Maryland
>
> The letter states in part—'Mr. Milne's parole did not expire on February 28, 1970. He is responsible to us until October 18, 1971.'"

It is clear from the record before us that the petitioner accepted the parole agreement. The explicit provisions of this instrument under Paragraph 2 provide that the term of parole is "until the expiration of such full, undiminished term" of ten years from October 18, 1961. "A conditional pardon is a grant, which becomes valid only on acceptance of it by the convict, who can reject it, but who on accepting it takes it subject to all the conditions in the grant." *In re Lorette,* 126 Vt. 286, 288, 228 A. 2d 790.

Moreover, the courts of this State do not have jurisdiction over the parole status of the petitioner and thus lack any authority to grant the writ of habeas corpus. The petitioner is under the supervision of the Probation and Parole Division of the Department of Corrections solely by reason of a compact agreement between this State and Maryland. Such compacts by Vermont with another state are authorized by 28 V.S.A. § 1301 known as the "Uniform Act for Out-of-State Parolee Supervision." Under the compact statute a probationer or parolee is permitted to leave the state where he was convicted (sending state) and reside in another state (receiving state), there to be supervised according to the same standards that prevail for its own probationers and parolees. To this extent only is the petitioner under the control of the probation division of this state. And it is only when he is discharged under the laws of Maryland and/or removed from supervision under the compact agreement, that his supervision here is terminated.

For reasons stated we do not find that the petitioner is held under parole status without due process.

Judgment affirmed.

For the Court,

F. RAY KEYSER
Associate Justice

APPENDIX

Order of the Washington County Court of the State of Vermont

STATE OF VERMONT
WASHINGTON COUNTY, SS.

EDWARD H. MILNE

VS.

STATE OF VERMONT
Washington County Court
Docket No. 13519

ORDER

In the above entitled matter the Petitioner, Edward H. Milne by petition in writing dated March 10, 1970 seeks the issuance of a writ of habeas corpus to release him from parole. The petition was served upon H. Russell Morss, Jr., Assistant Attorney General on the 10th day of March, 1970. Hearing was had upon the petition before the undersigned Superior Judge at the Washington County Court House on March 19, 1970. The petitioner appeared pro se and the State of Vermont appeared by Jon Stahl, Assistant Attorney General.

The State orally moved to dismiss the petition. Motion to dismiss as made in the record is to the effect that the petition is not addressed to any officer of the State of Vermont; that errors in a mittimus do not support habeas corpus; that habeas corpus does not lie to correct sentencing errors; and that the petitioner has not exhausted his State

remedies. Testimony was also introduced by the State relative to the parole status of the petitioner and an order for release on parole from the State of Maryland was introduced as Exhibit No. 1.

1. The petition for habeas corpus is not properly sworn to in accordance with the provisions of 12 V.S.A. 3955.

2. The petition was served upon a person not having the custody of the petitioner.

3. The petitioner is not in confinement but seeks a release from parole custody claiming that the State of Maryland should have granted to him a time reduction insofar as his length of sentence was concerned.

After a consideration of the arguments of the Petitioner, the petition, the motions to dismiss by the State, and State's Exhibit No. 1, it is ORDERED AND ADJUDGED:

1. The Petitioner has not made out grounds entitling him to release by writ of habeas corpus.

2. The petition for writ of habeas corpus is denied with exceptions to the petitioner.

Dated at Montpelier in the County of Washington this 25th day of March, 1970.

RUDOLPH J. DALEY
Superior Judge